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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1441

KEVIN H. WHITE,
MAYOR OF THE CITY BOSTON,
PETITIONER

v.

TALLULAH MORGAN, ET AL.,
JOHN J. KERRIGAN, ET AL.,
MASSACHUSETTS BOARD OF EDUCATION, ET AL.,
RESPONDENTS

ON A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Brief of Respondents Massachusetts Board of Education, et al., in Opposition to Certiorari

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Brief of Respondents Massachusetts Board of Education, et al., in Opposition to Certiorari

The respondents Board of Education and Commissioner of Education (hereafter collectively Board of Education) oppose the petition for certiorari of Kevin H. White, as Mayor of the City of Boston. The Board of Education has general superintendence over the Boston School Committee and must, under state law, see that the Committee complies with state and

federal laws pertaining to education, including the United States Constitution. Mass. Gen. Laws c. 15, § 1G. The Board of Education also provides various state and federal funds for the operation of the Boston public schools. Mass. Gen. Laws c. 15, § 1G.

Although a defendant in the proceedings below, the Board of Education was found not to have violated plaintiff's constitutional rights. *Morgan* v. *Hennigan*, 379 F. Supp. 410, 476-77 (D. Mass. 1974). The Board remains a party in the case to assist with the formulation of remedies.

Question Presented

Whether the actual record in this case discloses any important, unresolved issue of federal law.

Opinions Below

The opinion of the district court as reproduced in Petitioner's appendix omits that portion of the opinion containing maps and descriptions of the racial compositions of the districts in the court's remedial desegregation plan (see A. 94a), as well as other portions (omissions noted at A. 90a, 98a, 99a, 108a). The complete opinion is contained in the appendix to the petition of the Boston School Committee, No. 75-1445, which will be cited as "B.S.C.A." References to the consolidated appendix that was part of the record before the court of appeals will be cited as "C.A."

Statement of the Case

On May 10, 1975, the district court issued a systemwide desegregation plan for the Boston public schools, to be implemented in the 1975-1976 school year. The finding of unconstitutional segregation had been made on June 21, 1974. *Morgan* v. *Hennigan*, 379 F. Supp. 410 (D. Mass.), *aff'd sub nom. Morgan* v. *Kerrigan*, 509 F. 2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). During the interim 1974-1975 school year, the district court ordered the School Committee to implement, as a matter of federal law, a racial balance plan ordered by the Supreme Judicial Court of Massachusetts under a state statute (hereafter referred to as the Phase I plan, or Phase I). *See School Committee of Boston* v. *Board of Education*, 364 Mass. 199, 302 N.E. 2d 916 (1973). The Phase I plan achieved only limited desegregation.

In preparation for the development of a systemwide plan, the district court on October 31, 1974, issued guidelines and ordered the Boston School Committee to file a desegregation plan with the court on December 16, 1974 (A. 63a). The guidelines called for a plan that would minimize busing (A. 71a) and that would accomplish the greatest possible degree of actual desegregation, taking into account student safety and the practicalities of the situation (A. 63a). The Committee failed to file a plan on December 16, but later filed a "freedom of choice" plan that the district court eventually found to be unacceptable. Other parties also filed plans.

All of the plans filed, with the exception of one plan rejected as a matter of law, were referred to a panel of four masters. The February 7, 1975, Order of Appointment and Reference to Masters specified that the masters were "to conduct hearings and make recommendations for a desegregation plan . . . together with reasons for recommending that plan" (A. 14a).

The masters filed their final recommendations on March 31, 1975. On April 7, 1975, the parties filed extensive objections and commentary on these recommendations. A number of parties, including the School Committee, commented that the masters' plan was in error as to its projected racial compositions for the districts. Certain filings recommended modifications, some of which were later adopted by the district court (C.A. 379-437, 460-537). The parties commented on each other's filings, including the proposed modifications. See, *e.g.*, Memorandum of Mayor In Opposition to Objections of State Defendants, filed April 15, 1975. The district court held hearings on proposed modifications to the plan on April 10, 15, 18, and 23, 1975. On April 17, 1975, all parties were given copies of the court's proposed revisions of the masters' plan, many of which were drawn from the parties' filings. The court heard argument on the proposed revisions on April 18, 1975, and received written comments on April 22, 1975. There was further opportunity for written comments to be filed up to the issuance of the court's plan on May 10, 1975.[1]

On April 10, 1975, the Boston School Department filed new data on the size and racial composition of the student body (A. 14a). This data established that many projections and statistics in the masters' plan were in error (A. 14a, n. 13; 15a, n. 14). The new data formed the basis for the court's modifications of the recommended plan (A. 14a). The court reduced the number of community school districts recommended by the masters from nine to eight and adjusted the boundaries of several districts (A. 14a).

[1] This chronology established by the record disposes of the contention in the petition, at pages 18-19, that the district court was summary in its procedures. Further, despite the statements in the petition, there is no evidence in the record of the communications during this period between the court and the masters.

As the district court stated, "the masters' report and recommendations contained the key elements and formed the foundation of the plan promulgated by the court" (A. 14a). Both plans divided the city into geographic community school districts and a citywide district of magnet schools. Most of the features of the masters' plan praised in the petition as being highly innovative (see pages 14-16) are incorporated into the court's plan. The magnet school system maximizes voluntary integration. Individual schools are paired with specific universities, businesses, and cultural institutions (A. 84a-85a). Students and their parents are allowed to choose between a magnet school and remaining in their community school districts (A. 95a-96a). Councils of parents, students, and others have been established in each school, each district, and citywide (A. 86a-87a). Inadequate buildings have been closed (A. 83a-84a), and an administrator placed in charge of each school (A. 89a).

The court's plan creates community school districts ranging from 40 to 95 percent white (B.S.C.A 127-57). Individual schools may vary from the district composition by a percentage equal to $\pm$ one quarter of the racial composition of the district (A. 99a). In a system that was projected to be 51 percent white, the citywide magnet schools range from 56 to 46 percent white (A. 100a). East Boston, a 95 percent white area of the city with 5,700 students, is made a separate district (A. 76a). Eleven schools in that district are not desegregated because of the burdens of transportation that would be imposed (A. 76a). Prior to desegregation, 30,000 students, or 35 percent, were bused or used public transportation (A. 77a). During the operation of the Phase I plan, there was mandatory busing of 17,000 students (A. 101a-102a). Under the court's plan there is mandatory busing of 21,000 students (A. 101a). The average transportation distance within the districts is 2.5 miles, and the longest trip is less than 5 miles (A. 101a).

Bus travel times average between 10 and 15 minutes, and the longest trip is less than 25 minutes (A. 101a). Wherever possible, students bused at one grade level, such as elementary school, are assigned to walk-in schools at the next level, such as middle school (A. 101a). Busing has been commonplace in the Boston public schools for decades; in 1972 the school committee leased 129 buses daily in addition to providing numerous passes for use of the public transit system (A. 77a).

Reasons for Denying the Writ

I. Introduction.

Petitioner does not seriously contend that the decision of the court of appeals is in conflict with the applicable decisions of this Court or with a decision of another court of appeals. The sole basis on which Petitioner seeks review is his claim that this case presents important, unresolved issues of federal law. The questions that the petition purports to raise are not presented by the record in this case, nor are they necessary to the decision of this case. Were a writ of certiorari to issue, the respondents respectfully suggest that this Court, after examination of the record, would find the writ to have been improvidently granted.

II. The Claims Made In The Petition Are Not Supported By The Record.

Petitioner argues that the district court was barred from adopting its own modified version of the masters' plan as the desegregation plan for Boston. He contends that the principles

guiding the court's equitable discretion and, independently, the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758, required instead that the court adopt the masters' plan without change. This Court need not consider the merits of these legal claims because the factual assertions made in their support have no basis in the record of this case.

A. *The Record Establishes That The Masters' Plan Would Not Have Achieved Substantially The Same Degree Of Desegregation As The Court's Plan.*

Petitioner's assertion, at pages 22-23, that the masters' plan would have achieved the same degree of desegregation as the court's plan is simply fictitious. The unattributed table at page 23 of the petition purporting to support the claim is contrary to facts in the record, and respondents are unable to ascertain the source of the table. The racial compositions of the districts for the two plans as they are actually contained in the record are set forth in a table in Appendix A to this brief.[2] In fact, the masters' plan would not have achieved either the racial compositions that it projected or those now claimed on its behalf in the petition.

1. The Masters' Projected Racial Compositions Were Based On Erroneous Data.

Petitioner largely overlooks the fact that the aspect of the masters' plan on which he principally relies, the projected racial compositions of the masters' proposed community school districts, were based on incorrect data[3] (*see* A. 14a, n. 13; 15a, n. 14; 74a). Two courts have held that the masters'

[2] Oddly, the petition's claimed racial compositions are not even the same as those set forth in the masters' plan it champions.

[3] For example, the masters projected the West Roxbury district to be 80 percent white. Based on corrected data, the district court found the same district to be 92 percent white (A. 14a, n. 13; 74a).

racial compositions and number of students in the districts were clearly erroneous (A. 14a, n. 13; 15a, n. 14; 74a), and until the filing of this petition none of the parties disputed the existence of these errors (A. 14a, n. 13). Petitioner's new, unsupported arguments contradict not only the record but his own prior position (*see* Brief of Mayor filed in his appeal to the court of appeals, p. 24, n. 1), and there is simply no basis for accepting them.

Using the corrected data submitted by the Boston School Department, a brief examination of the amount of desegregation under the masters' plan reveals its inadequacy. With the 10 percent deviation allowed by the masters' plan, some 65 percent of the students in the community school districts would have been in schools 70 percent or more minority or white.[4] Within the community districts, 37 percent of the schools would have been more than 80 percent white or minority.[5] This would have happened in a system projected to be 51 percent white (A. 100a), in a city where the court found it "possible to draw desegregated districts that are relatively small in numbers of students and to limit transportation distances to an average of 2.5 miles each way within a district" (A. 75a). The court of appeals found that the district court's plan accomplished more desegregation than the masters' plan would have (A. 18a-20a), and Petitioner's unfounded assertion to the contrary, at page 24, should be rejected.

2. Petitioner's Method Of Comparing The Two Plans Is Misleading.

Petitioner attempts to compare the uncorrected projected racial compositions in the masters' plan with the actual racial

[4] *See* A. 15a, n. 14, and Masters' Plan, App. E, pp. 7-21. The districts involved are West Roxbury, Burke, South Boston, Madison Park, East Boston, and Jamaica Plain.

[5] 48 out of 131 schools.

compositions of enrollments in schools this year. Essentially, Petitioner assumes that the masters' projections and the likely reality under an implemented masters' plan would have been identical, while at the same time pointing to differences between actual compositions and those projected in the court's plan. This analytical sleight of hand is illogical and must be rejected. Moreover, it seeks to overthrow the court's plan with data not available until long after the plan was approved.

The factors that skewed the racial profile of actual student enrollments from those projected under the court's plan, such as abuse of the student transfer system,[6] would have had a similar effect on the masters' plan. Because the masters' plan was projected to accomplish less desegregation than the court's, the only reasonable inference, contrary to Petitioner's selective reasoning, is that these same factors would have operated to produce correspondingly less desegregation under the masters' plan, if it had been implemented, than the actual desegregation accomplished by the court's plan. Thus, the statement at page 22 of the petition that the court's plan achieves no more desegregation than the masters' plan requires a suspension of logical inference, and is contrary to the record.

B. *It Is Not Established That The Masters' Plan Would Have Required Less Busing Than The Court's Plan.*

The corrections to the erroneous data on which the masters' plan was based indicated that the plan would clearly have

[6] *See* Memorandum and Orders Modifying Desegregation Plan, May 3, 1976, where the district court held, at p. 9: "Implementation of the May 10, 1975 plan has been handicapped by evasions of the court's order as to voluntary student transfers . . . reminiscent of the exceptions contrived to nullify a controlled transfer policy . . . described in . . . the court's opinion on liability."

required more busing than the masters had projected, and perhaps no less than that required in the district court's plan.

The masters projected mandatory busing for 10,700 to 14,900 students, although their estimates did not include busing for safety, convenience, or special programs (Masters' Plan, pp. 51-52). In comparison, taking into account busing for safety, distance, and controlled transfer purposes, the court's plan estimated 21,000 students would be bused. Moreover, the transportation estimates in the masters' plan, like other figures, cannot reasonably be taken as accurate.[7]

The masters made serious errors in computing the numbers of students in the districts, thereby causing errors in their transportation estimates. As the court of appeals noted (A. 15a, n. 14), there were substantially more students in some districts than the masters had anticipated, and more students than the seating capacity for these districts would hold; many of these overflow students (of which there were 2,000 in one district alone) would have had to be bused to available seats (*id.*). As the court of appeals found,

> The Mayor's assumption that the court's plan would involve anything close to the mandatory busing of 6100 more students is therefore significantly vulnerable. (*Id.*)

The district court similarly found the estimates of busing in the masters' plan to be "then and now very doubtful" (Tr. 4/18/75, p. 96). Because of the poor fit between capacities and both numbers of students and racial compositions in the masters' proposed community school districts, the masters'

[7] A preliminary indication of the infirmity of these figures is that the masters purported to bus from 2,100 to 6,300 fewer students than the 17,000 bused under the Phase I plan, while claiming to accomplish much more desegregation than the Phase I plan.

plan, in fact, might have required more busing than the court's plan. It cannot, in any event, be concluded that this case presents a choice between two plans, one of which involved less busing.

C. *Independent Grounds Supported The Court's Modifications Of The Masters' Plan.*

As the record demonstrates, there were, apart from the issue of the constitutionality of the racial compositions in the districts, independent bases supporting the district court's modifications of the masters' plan. Their common theme is that the masters' plan would not have worked, and the district court was required to adopt a plan that would work. *Green* v. *County School Board of New Kent County,* 391 U.S. 430, 439 (1968). Some of the deficiencies in the masters' plan are set forth below.

1. *Severe overcrowding.* Although the masters' plan, at page 35, "guaranteed" every student a seat in his community school district, in six of the nine districts there were considerably more students, by thousands in some districts, than there were seats (C.A. 388, 484-85). It is unreasonable to assume that all of these excess students would have chosen citywide schools or that their choice patterns as exercised in fact would have achieved the racial compositions projected by the masters for both the district and magnet schools. Further, because of facility closings and grade level designations, there would not have been enough middle school seats in the citywide schools for all excess district middle school students, the deficiency totalling almost 3,000 seats (C.A. 479). Some of the alterations made by the court in the community district lines proposed by the masters relieved this overcrowding. For example, revision of the West Roxbury/Jamaica Plain line, adding to Jamaica Plain, allowed full utilization of underenrolled Jamaica Plain middle schools (C.A. 477), while

revision of the West Roxbury/Hyde Park boundaries gave overcrowded West Roxbury an additional middle school (C.A. 477-78).

2. *Instability.* The masters' plan would have unnecessarily moved children who had been successfully transferred during Phase I to achieve integration, a problem alleviated by some of the court's revisions of district lines (C.A. 477, 491-96). Perhaps more importantly, as found by the district court (A. 75a), the widely disparate racial compositions of the masters' districts

> could result in the sort of residential instability that could destroy in a few years the desegregation accomplished initially in those districts. White parents seeking to leave a district where their children were a minority in the school population could move to districts with white majorities, gradually resegregating both the districts they left and those they entered. Just as the location of schools is acknowledged to have an effect on residential segregation, *Swann* . . . so large disparities in the racial composition of districts may endanger desegregation, and the court has an obligation to seek a plan that offers hope of lasting desegregation.

This finding was affirmed by the court of appeals (A. 18a).

3. *Unequal access to magnet schools.* Because of the precarious ratio of the races in several of the masters' proposed districts, students of the less numerous race (*e.g.*, blacks in West Roxbury and whites in Burke) would have had to be denied access to citywide schools of their choice in order to maintain whatever desegregation had been achieved in those districts (A. 75a, 18a). Thus, disparities in the masters' district racial compositions would have made it necessary "to

deny students entry to citywide schools because of their race and district of residence" (A. 75a). The modifications made to the masters' plan by the district court remedied this problem (A. 75a).

4. *Inequities.* The masters' plan closed an excessive number of schools in minority areas and converted a number of minority neighborhood schools to citywide schools (C.A. 401-04, 480-82). This would have aggravated a separate problem with the masters' plan: the imposition of a heavier burden of transportation on minority students (C.A. 491-505). The court's plan resulted in greater equity to the minority community (A. 84a).

III. The District Court's Plan Was In Accord With The Decisions Of This Court.

A. *The District Court Considered The Practicalities Of The Situation.*

Contrary to Petitioner's assertions, the record establishes that the district court gave careful consideration to the practicalities of the situation, in accordance with the decisions of this Court (A. 63a, 71a).

1. *Minimizing transportation.* The district court consistently attempted to minimize transportation in its guidelines for drafting a plan (A. 71a), its revisions of district lines (A. 71a, 77a), its use of magnet schools (A. 102a), its facility retention and closings (A. 83a), its transfer policy (A. 102a), its modification of the masters' assignment process to the use of geocodes (A. 79a), and its districting of East Boston as an intact, white district (A. 79a). The district court explicitly stated that it did not favor "forced busing" (A. 77a), and that its plan attempts to minimize it (A. 71a, 78a).

The amount, length, and duration of the busing required by the court's plan is reasonable under this Court's standards. Compared with the pre-desegregation transportation of 30,000 students and the mandated busing of 17,000 students under Phase I, the court's plan requires mandatory transportation of 21,000 students[8] (A. 101a, 77a). Within community districts the average travel distance is 2.5 miles; the maximum is 5 miles (A. 101a). Travel times average 10-15 minutes, with a maximum of 25 minutes (A. 101a). Many of the students who are bused travel shorter distances than those bused under the Phase I plan. The transportation ordered here is of far fewer students, for shorter distances, and for shorter lengths of time than that ordered in other desegregation cases. *See Northcross* v. *Board of Education of Memphis City Schools*, 489 F. 2d 15 (6th Cir. 1973), *cert. denied*, 416 U.S. 962 (1974) (and *see* 466 F. 2d 890, 895 (6th Cir. 1972)) (38,000 out of 145,581 students bused in system previously unfamiliar with busing); *Bradley* v. *School Board of Richmond*, 325 F. Supp. 828 (E.D. Va. 1971) (48,000 students in district; 10,500 bused before desegregation, 13,500 under interim plan, at least 20,500 under final plan); *Winston-Salem/Forsyth Board of Education* v. *Scott*, 404 U.S 1221, 1225, 1227 (1971) (Burger, C.J., denying stay) (50,000 students; busing increased from 18,000 to 34,000); *Kelley* v. *Metropolitan County Board of Education of Nashville*, 463 F. 2d 732, 741 (6th Cir.), *cert. denied*, 409 U.S 1001 (1972) (94,170 students; busing increased from 33,485 to 48,000). The transportation here is well within the limits established by this Court in *Swann* v.

[8] If the district court had not issued its systemwide desegregation plan, the Phase I plan with its mandatory busing would have remained in effect under state law. *School Committee of Boston* v. *Board of Education*, 364 Mass. 199, 302 N.E. 2d 916 (1973). *See also School Committee of Springfield* v. *Board of Education*, Mass. Adv. Sh. (1974) 2031, 319 N.E. 2d 427 (1974), *cert. denied*, 421 U.S. 947 (1975).

Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971).

2. *Community Acceptance.* The district court did not overlook the acceptability of its plan to the community. In its concern for the stability of the plan and that the burdens of the plan be equitably distributed (A. 34a), the district court was cognizant of the necessity to consider the long-run success of the desegregation process. The court's sensitivity on this point is manifest also in its attempts to avoid isolation of a particular racial or ethnic group (A. 75a, 79a, 99a), and to insure that particular educational entitlements such as the bilingual and special education programs (*see* Mass. Gen. Laws c. 71A and 71B, respectively) continue to be provided (A. 80a). Far from ignoring the concerns of the communities in Boston, the court provided for a large degree of community participation through the establishment of multi-racial school, district, and citywide councils (A. 103a-106a).

There was no error by the district court in refusing to consider "white flight." This Court has repeatedly held that "white flight" cannot "be accepted as a reason for achieving anything less than complete uprooting of the dual public school system." *United States* v. *Scotland Neck City Board of Education*, 407 U.S. 484, 490-91 (1972); *Monroe* v. *Board of Commissioners*, 391 U.S. 450 (1968). The flaws in Petitioner's argument were well expressed by the court of appeals (A. 31a-33a), and will not be repeated here. Further, as noted by both lower courts, it was not proved that white flight is causally related to desegregation, particularly given the heated dispute among experts on this question (A. 23a, n. 7; 30a-31a, n. 29). The masters themselves called the "white flight" contention "a misleading fiction" (Masters Plan, p. 65, n. 1).

Nor was the district court obliged to adopt a lesser degree of desegregation in light of community opposition. *Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958). There is no evidence in the record of the acceptability of the court's plan as opposed to the

masters' plan, and Petitioner cites only to selected materials outside of the record. A well orchestrated publicity campaign by parties such as Petitioner in support for the masters' plan cannot overcome the obligation of the district court to evaluate that plan for its effectiveness or obscure the fact that the masters' plan, in many respects, was unsound and fraught with errors.

3. *Cost Considerations.* Contrary to Petitioner's contentions, the district court made specific findings about cost considerations (A. 102a-103a), and attempted throughout its plan to minimize costs (A. 77a, 83a-84a, 88a). Thus, the question Petitioner claims to present, whether lower courts are obligated to make such findings, is a hypothetical one and not raised by the record here.

There is no evidence in the record that the masters' plan would have been less costly than the court's plan. As demonstrated above, the transportation estimates in the masters' plan were infirm. Petitioner failed to introduce any evidence at all in the proceedings below on the relative costs of the masters' plan and the court's plan. Indeed, Petitioner objected to the costs of certain elements in the masters' plan (C.A. 617-18, 624) and argued that the masters had failed to make findings that the costs of their plan were "reasonable and within the predictable, available limits of current budgets" (C.A. 613). Before this Court, Petitioner now reverses position and argues, at page 8, that the masters took such fiscal considerations into account. Petitioner did not raise this issue before the court of appeals (*see* Brief of Mayor filed in the court of appeals, p. 7) and should not now be heard on it.[9]

[9] The budget and tax assertions in the petition are also not based on evidence in the record. Moreover, while the tax rate in Boston is high, the $196.70 per $1,000 is based on assessments of about 25 percent of value. *See Town of Sudbury* v. *Commissioner of Corporations and Taxation*, Mass. Adv. Sh. (1974) 2405, 2420, 321 N.E. 2d 641, 648 (1974). The assessment ratio varies throughout the city with the higest ratio, 40 percent, being applied to the black neighborhood of Roxbury as against a composite city-wide residential ratio of 27.8 percent. *Id*. The Supreme Judicial Court of Massachusetts commented that "the process has lost contact with reality." *Id*. It is the black taxpayers of Boston who bear the higher taxes.

Further, while the overall tax rate in Boston has remained constant at $196.70 per $1,000 assessed valuation for the last several years despite inflation, that portion of the $196.70 that is the School Tax Rate was reduced from $48.91 in fiscal year 1975 to $45.41 in fiscal year 1976, the year at issue here. *See* "Fiscal Year — School Tax Rate Recapitulation" forms filed by City of Boston for fiscal years 1975 and 1976 with the Department of Corporations and Taxation of the Commonwealth of Massachusetts, copies of which were filed with the district court on May 7, 1976.

In contrast with his arguments before this Court, Petitioner did not contend before the district court that desegregation costs are unmanageable. Rather he asserted, in a document entitled Report on School Finances, Fiscal Year 1976, filed February 2, 1976, that

> with sound management and the establishment of organizational priorities, the School Committee could have fully complied with orders of the Federal Court and still maintained a balanced budget. *Id.* at 12.

Finally, state and federal financial assistance to Boston for its public schools for the first year of systemwide desegregation has increased substantially over prior years.[10]

[10] The increase in state and federal assistance amounts to $36,679,000 over the prior year, for a total of over $122 million. Oral findings by district court, May 10, 1976 (transcript not yet available).

B. *The Court's Plan Was Within Its Equitable Powers As Defined By This Court.*

The plan challenged here fell well within the parameters of the district court's equitable discretion as established by this Court in *Swann*, *supra*, 402 U.S. 1 (1971), and other cases. Petitioner's argument that this equitable discretion is more limited may be rejected as a matter of law.

While federal desegregation courts wisely give deference in the first instance to plans drafted by local authorities, if the authorities should default, the burden falls on the district court to fashion a remedy to assure a unitary school system. *Swann*, *supra*, 402 U.S. at 15-16. No such deference is owed to a plan drafted by masters appointed by the court to assist with the fashioning of the remedy. In the instant case, the district court's order of reference to the masters merely directed them to "conduct hearings and make recommendations"; it did not authorize them to make findings, entitled to deference under Fed. R. Civ. P. 53(e)(2). The scope of the masters' authority as defined by the court's order of reference is unchanged by the fact that this is a desegregation case. The court of appeals adequately answered Petitioner's contentions on this point (A. 14a).

The obligation on the district court was "to achieve the greatest possible degree of actual desegregation, taking into account the practicalities of the situation." *Davis* v. *Board of School Commissioners of Mobile County*, 402 U.S. 33, 37 (1971). The court of appeals found that the district court had not exceeded this obligation (A. 18a-20a), and that

> [t]he amount of additional desegregation that was purchased by the court's plan was neither trivial nor disproportionately burdensome. (A. 20a.)

Petitioner has not met and cannot meet his burden of showing that there was an abuse of discretion or that the findings of the courts below were clearly erroneous.

IV. No Question Suitable For Review Has Been Presented Concerning The Equal Educational Opportunities Act Of 1974.

Petitioner argues that the Equal Educational Opportunities Act of 1974, 20 U.S.C. §§ 1701-1758 (the Act), requires district courts, in choosing between two constitutionally acceptable plans, to adopt the plan that requires less mandatory busing of students. The question whether Petitioner's interpretation of the Act is correct is not presented by this record or framed by this case.

The district court did not confront, as Petitioner suggests, a choice between two alternative remedial plans that were equally acceptable; the masters' plan did not achieve a constitutionally sufficient amount of desegregation (C.A. 379-413, 460-74), and was simply not workable. *Green*, *supra*, 391 U.S. at 439. The Act expressly disclaims any modification of the judiciary's power to enforce Fourteenth Amendment rights. 20 U.S.C. § 1702(b). The Act also preserves the range of the district court's discretion, described in *Swann*, to ascertain whether a particular plan will or will not work. *See Brinkman* v. *Gilligan*, 518 F. 2d 853 (6th Cir. 1975).

Petitioner's argument that the Act somehow limits the equitable discretion of the district court must also be rejected as a matter of law. *See North Carolina State Board of Education* v. *Swann*, 402 U.S. 43, 45-46 (1971). This Court has consistently interpreted similar statutes as not intending to withdraw from courts their historic remedial powers and has thus avoided any question about the possible unconstitutionality

of such statutes. *Swann*, *supra*, 402 U.S. at 16-18 (Civil Rights Act of 1964, Tit. IV, 42 U.S.C. § 2000c); *Drummond* v. *Acree*, 409 U.S. 1228 (1972) (Powell, J.) (Education Amendments of 1972, Tit. VIII, § 803, 20 U.S.C. § 1653). It is not "meaningless," as Petitioner suggests, to read the Act as in harmony with the equitable standards established by this Court. Any other reading would unnecessarily call into question the constitutionality of the Act.

What the Act does do is create a preference or priority listing of remedies for Fourteenth Amendment violations. The court, then, is required to make findings about the efficacy of particular remedies. 20 U.S.C. § 1713. In this case the district court made the mandated findings (A. 101a-102a); its plan revised attendance zones and grade structures, provided for the construction of new schools, closed old schools, allowed a controlled transfer policy, and created magnet schools in order to minimize mandated transportation (A. 102a). Petitioner did not contest these findings in either of the courts below and presents no issue here worthy of review.

V. This Court Should Exercise Its Discretion To Decline Review.

Finally, this Court should exercise its discretion against review because, in Respondents' view, denial of the writ is proper and will best serve the increasingly stable movement toward a unitary system in Boston. The realization by the officials and people of Boston that desegregation is inevitable is of primary importance. As the district court recently stated in its May 3, 1976, Memorandum and Orders Modifying Desegregation Plan, at pages 2 and 4:

> Some parties have encouraged a popular misconception that, if only sufficient pressure can be brought against the plaintiffs, the school department, members of monitoring councils and the court, the plan may be set aside by the trial court. . . .
>
> . . . . . .
>
> The urgent need, in our opinion, is not official reaction to crises, however commendable that may be, but official acceptance of the constitutional necessity and inevitability of public school desegregation and public commitment by elected officials to support school administrators and teachers and parents and students who are doing their best to bring it about.

In spite of official resistance (A. 43a) and the misleading statements by elected officials that they are for school desegregation but against forced busing (A. 77a), the process of desegregation is under way in Boston. That process would be ill-served by further unnecessary review.

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Appendix A.

Districts	District Racial Compositions Projected in Masters' Plan	Accurate Masters' District Racial Compositions as Found by Court	± 10% Deviation for Each School Based on Accurate Data	District Court Plan's Racial Compositions for Districts	Comments
1. Brighton — Mission Hill	white black other 50% W 50W 30B 20o			52W 22B 26o	Master's district not changed by district court
2. Jamaica Plain	40% W 40W 40B 20o			55W 30B 15o	
3. West Roxbury	80% W 80W 15B 5o	92% W 92W 5B 3o	100% W	62W 34B 4o	
4. Hyde Park	48% W 48W 48B 4o			66W 32B 2o	
5. Dorchester	50% W 50W 43B 7o	45% W	35% W	54W 40B 6o	
6. Burke	50% B 25W 50B 25o	63% B 37W 63B 10o	73% B		This district was eliminated in the court's plan by being merged with adjacent districts
7. South Boston	60% W 60W 30B 10o	67% W	77% W	62W 23B 15o	
8. Madison Park	30W 50B 20o			46W 29B 25o	
9. East Boston	95W 3B 2o			95W 3B 2o	District unchanged in court's plan